No. [redacted] 18

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, [redacted]-AFL-CIO, *Petitioner*, (Local 283)

v.

RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEFANIC, GEORGE KOZBIEL, AND THE NATIONAL LABOR RELATIONS BOARD, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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MISCELLANEOUS

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW-AFL-CIO, *Petitioner,*

v.

RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEFANIC, GEORGE KOZBIEL, AND THE NATIONAL LABOR RELATIONS BOARD, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, UAW-AFL-CIO, prays that a writ of certiorari issue to review a final order of the United States Court of Appeals for the Seventh Circuit denying petitioner leave to intervene in proceedings to review an order of the National Labor Relations Board.

Opinions Below

The decision and order of the National Labor Relations Board is reported at 145 NLRB No. 9. Without opinion, the court below denied leave to petitioner to intervene on September 16, 1964, and denied a petition for reconsideration of that action by order of October 6, 1964. These orders are printed in Appendix A, pp. 15 to 23, *infra*, together with the union's petition for intervention and petition for reconsideration of the order denying intervention.

Jurisdiction

The order of the United States Court of Appeals for the Seventh Circuit denying the union leave to intervene was entered on September 16, 1964 and a timely petition for reconsideration was denied by order of October 6, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).[1]

Question Presented

When the National Labor Relations Board dismisses an unfair labor practice complaint against a union and the charging employees then bring review in the Court of Appeals, may the union be denied intervention in the judicial review proceeding wherein it will be determined whether it has violated federal law?

Statement

This case originated from charges brought by certain employees of Wisconsin Motor Corporation before the

[1] Though we believe that statutory certiorari jurisdiction presently lies consistent with the "party to the case" proviso of 28 USC 1254(1), should the Court disagree, we respectfully request leave to have this petition filed as one under 28 USC 1651 for common-law certiorari.

National Labor Relations Board against petitioner, UAW-AFL-CIO, alleging that their rights under Section 8(b)(1)(A) of the Act were being violated by the union. The violation charged was that the union, through disciplinary fines, enforced a regulation establishing a ceiling on piece-rate earnings for all union members. In due course a complaint was issued by the General Counsel, hearings were held with the union the defending party, an intermediate report of a Trial Examiner exonerated the union, and on January 17, 1964 the National Labor Relations Board held that the union piece-rate ceiling did not violate Section 8(b)(1)(A), and dismissed the complaint against the union.

Subsequently, the employees who were the charging parties before the Board filed a petition for review in the Court of Appeals for the Seventh Circuit asking that the Board's decision be vacated and the Board ordered "to enter an order finding that the Union has committed unfair labor practices and granting appropriate relief . . ." Only the Board was named a party defendant to the proceedings. On September 15, 1964, without opposition by the Board, the union filed in the court below a petition (see *infra*, p. 15) to intervene in the pending proceedings. The petition pointed out that the union "will be directly affected by any decision rendered by this court."

On September 16, 1964, the Honorable Latham Castle, Circuit Judge, entered an order denying intervention but granting leave to the petitioner (UAW-AFL-CIO) "to file a brief in this case as amicus curiae without leave to participate in the oral argument of this cause." See *infra*, p. 17. From this denial of leave to intervene as a party, the union filed a petition for reconsideration by the court *en banc* or by a division thereof. See *infra*, p. 18. By an order, without opinion, of October 6, 1964, this petition

was denied per Judges Hastings, Knoch, and Castle. See *infra*, p. 23.

It appears from the action of the court below in this case and in previous rulings (see *infra*, n. 6, p. 8), that as a matter of policy the Seventh Circuit denies intervention in Labor Board review proceedings to the prevailing party before the Board. Certiorari is sought to review a recurrent and important intervention question involving the conflicting administration of justice in federal courts, which should be resolved by this Court's exercise of its general supervisory authority.

REASON FOR GRANTING THE WRIT

This Case Presents a Recurrent and Important Intervention Issue Involving Conflicting Administration of Justice in the Several Courts of Appeals, Which This Court Should Resolve Under Its General Supervisory Authority.

May a union charged before the Labor Board be barred from the judicial review proceedings in which it is to be determined whether the union has violated federal law?

Congress has enacted no statutory intervention provision for Court of Appeals review of Labor Board orders. When a petition to review a Board dismissal of a complaint is brought by the unsuccessful charging party, most circuit courts allow intervention to the prevailing respondent before the Board; but in the First and Seventh Circuits and occasionally in other circuits, such intervention has been denied. See *infra*, p. 8. The effect of such rulings as in the instant case is denial of participation in the Court of Appeals and opportunity to petition for certiorari in this Court to the party charged with violating federal law and against whom government sanctions will run if the agency ruling is judicially reversed. As we show herein, this Court's

review is warranted because the decision below (1) infringes upon the constitutional guarantee of due process of law, (2) presents a clear conflict among the circuit courts, (3) makes sheer fortuity controlling upon the right of intervention, and (4) is subject to this Court's remedial review and correction under its general supervisory authority over administration of justice in federal courts.

1. *Due process infringed.* Barring a party charged before a federal agency from participation in the judicial review of his case, is at odds with numerous due process rulings of this Court. This Court has repeatedly held that a person charged by government with misconduct or law violation, or to be subjected to governmental regulation or legal sanctions, has the right to due process hearing in the adjudication of his case.[2] Where due process applies, it does so from the beginning to the end of the adjudicatory proceedings.[3] It includes equal opportunity to invoke and to participate in appellate judicial review.[4]

Thus the constitutional injury in denial of participation in the Court of Appeals is clear at the stage when the case is heard before that Court. It is equally clear thereafter,

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[2] See *Hovey* v. *Elliott*, 167 U.S. 409; *Londoner* v. *Denver*, 210 U.S. 373; *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413; *Morgan* v. *United States*, 304 U.S. 1; *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 232-233; *In re Oliver*, 333 U.S. 257; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, (and cases cited at pp. 165-166); *Greene* v. *McElroy*, 360 U.S. 474.

[3] See *Hopt* v. *Utah*, 110 U.S. 574; *Frank* v. *Mangum*, 237 U.S. 309, 327; *Saunders* v. *Shaw*, 244 U.S. 317; *Morgan* v. *United States*, 298 U.S. 468; Cf. *Western Pacific* v. *Southern Pacific Co.*, 284 U.S. 47; *Columbia Broadcasting System* v. *United States*, 316 U.S. 407; *Ashbacker* v. *FCC*, 326 U.S. 327.

[4] See *Saunders* v. *Shaw*, 244 U.S. 317; *International Steel & Iron Co.* v. *National Surety Co.*, 297 U.S. 657, 665; *Cole* v. *Arkansas*, 333 U.S. 196, 201-202; *Price* v. *Johnston*, 334 U.S. 266, 280; *Griffin* v. *Illinois*, 351 U.S. 12; *Chessman* v. *Teets*, 354 U.S. 156; *Coppedge* v. *United States*, 369 U.S. 438, 447-448.

when in the event of the Court's reversal of the agency decision, the respondent stands convicted of wrongdoing but cannot seek certiorari under 28 U.S.C. 1254 from the adverse judicial decision, having been denied requisite status of a "party to" the case. *In re Leaf Tobacco Board*, 222 U.S. 578. As a party, if the Board should decline to seek certiorari, the intervened respondent may himself seek certiorari.[5] *International Union of Mine, Mill and Smelter Workers* v. *Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335. As an amicus, the Board's decision not to seek certiorari forecloses the respondent. Finally, if this Court grants review, the respondent denied intervention below continues in a non-party status. Such a result is inconsistent with this Court's announced policy (in original cases) that orderly determination of issues "requires that they be adjudicated in a proceeding in which all the interested parties are before the Court." *United States* v. *Louisiana*, 354 U.S. 515.

Nor is it an answer to the due process violation that in the event the Court of Appeals or this Court should reverse the decision of the Labor Board, then a new Board order will issue against the respondent in lieu of the former order in his favor and this new order might be brought for

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[5] The practical significance of a Board respondent's opportunity to petition for certiorari is highlighted by a case before this Court at its last term. In *United Steelworkers* v. *NLRB*, 376 U.S. 492, the Labor Board's exoneration of the union from a Section 8(b)(4) charge, was reversed by the Second Circuit. The union, which had been allowed intervention in the Court of Appeals, sought and obtained certiorari under circumstances where the Board had not itself filed a petition for certiorari "because the Solicitor General concluded that other cases were entitled to priority in selecting the number of cases which the government can properly ask this Court to review" (p. 2, *Memorandum for the NLRB*, April 1963). On the merits, this Court unanimously reversed the lower court. Had the case been brought in the Seventh or First Circuits, under identical circumstances there would have been no opportunity for this Court's remedial review.

review to the Court of Appeals by the respondent before the Board as an "aggrieved party." Such a right of subsequent review *may* exist as a technical matter, but it is without substance once the federal appellate courts have adjudicated the merits of the issue. Cf. *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 420-423. The suggestion that such an "ex-post facto" judicial hearing suffices to protect the rights of a party is repelled by this Court's ruling in *Ashbacker* v. *FCC*, 326 U.S. 327, 330-331. There the Court rejected the argument that the right of applicant A to a hearing was not infringed by denial of participation in a prior proceeding involving applicant B, when the grant of a license to applicant B would preclude the subsequent grant of a license to applicant A: "We do not think it is enough to say that the power of the Commission to issue a license on a finding of public interest, convenience or necessity supports its grant of one of two mutually exclusive applications without a hearing of the other. For if the grant of one effectively precludes the other, the statutory right to a hearing which Congress has accorded applicants before denials of their applications becomes an empty thing." This Court noted that once a competing and mutually exclusive license is granted to an opponent, a party carries a burden "which cannot be met" because it makes "its hearing a rehearing on the grant of the competitor's license rather than a hearing on the merits of its own application. That may satisfy the strict letter of the law but certainly not its spirit or intent."

No more than in *Ashbacker* does the contingent right to a second proceeding before the appellate courts upon the identical questions of fact and law involved in pending judicial review proceedings afford any real protection to the party barred from participating therein. Even if the "rule of the case" is not formally applied on a second

appellate review of the identical issues, the decision can be no more than a rehearing and reaffirmation of a *fait accompli.*

2. *Conflict of Circuits.* There exists a clear conflict of law among the circuit courts on the question at issue. The Labor Board in this and other cases has concurred in applications to intervene before the circuit courts by respondents who have prevailed before the Board. Nevertheless the Seventh Circuit and the First Circuit have established a policy of denial of intervention to the prevailing respondent before the Board.[6] The great majority of circuit courts on the other hand will permit intervention to the prevailing respondent,[7] and included among these is the Court of Appeals for the District of Columbia Circuit. The conflict between the policy of that Court and the rule in the Seventh Circuit is particularly significant since the statute (Section 10(f)) permits a petition for review of a Labor Board decision to be filed *either* in the District of Columbia Circuit or in the circuit where the alleged unfair labor practice occurred or the petitioner resides or transacts business. Thus if the petitioning union,

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[6] *Flack* v. *NLRB*, 55 LRRM 2299 (C.A. 7), mandamus denied 376 U.S. 948; *Chauffeurs, Teamsters & Helpers "General" Local No. 200* v. *U.S. Court*, (C.A. 7) mandamus denied, 363 U.S. 835; *Amalgamated Meat Cutters* v. *NLRB*, 267 F. 2d 169 (C.A. 1), cert. denied 361 U.S. 863. See also *Haleston Drug Stores* v. *NLRB*, 190 F. 2d 1022 (C.A. 9); *Seafarers' International Union* v. *NLRB*, (C.A. 5) cert. denied 364 U.S. 816. The Seventh Circuit formerly granted such interventions. *Kovach* v. *NLRB*, 229 F. 2d 138 (1956); *Albrecht* v. *NLRB*, 181 F. 2d 652 (1950).

[7] See, e.g., *Amalgamated Clothing Workers* v. *NLRB*, 324 F. 2d 228 (C.A. 2); *Industrial Union of Marine and Shipbuilding Workers* v. *NLRB*, 320 F. 2d 615 (C.A. 3); *Selby-Battersby & Co.* v. *NLRB*, 259 F. 2d 151 (C.A. 4); *Darlington Mfg. Co.* v. *NLRB*, 325 F. 2d 682 (C.A. 4); *International Union, UAW-CIO* v. *NLRB and Wooster Division of Borg-Warner Corp.*, 236 F. 2d 898 (C.A. 6); *Minnesota Milk Co.* v. *NLRB*, 314 F. 2d 761 (C.A. 8); *Great Western Broadcasting Corp.* v. *NLRB*, 310 F. 2d 591 (C.A. 9); *Local 1441, Retail Clerks* v. *NLRB*, 326 F. 2d 663 (C.A.D.C.); *Teamsters Local 79* v. *NLRB*, 325 F. 2d 1011 (C.A.D.C.).

employer, or individual employee, by reason of residence or place of business, chooses to file for review in the Seventh Circuit, his "opponent" will be barred from participation in the judicial review proceedings, but if he should opt to petition in the District of Columbia a contrary result will obtain. Such a conflict of rules in different circuits on a matter involving rights of substance and importance, requires this Court's review and harmonization.

3. *Intervention Controlled by Fortuity.* In enacting the statutory review procedure from the Labor Board, Congress envisioned orderly continuation of the Board proceedings—proceedings wherein charging parties and respondents have full status as litigants. Yet if the Seventh Circuit's policy stands unreviewed, then sheer fortuity controls the opportunity of parties before the Board to participate in the judicial review proceedings:

i. Statutory review over numerous federal agency decisions, including some Labor Board decisions, lies in the District Court.[8] Rule 24, Federal Rules of Civil Procedure, provides for intervention of right when a statute confers it, or when representation by existing parties may be inadequate and the applicant may be bound by the judgment.[9] It grants permissive intervention when the applicant's claim or defense has a question of law or fact in common with the pending action. Under the standards of Rule 24 applicable to review proceedings in the District

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[8] In addition to the numerous specific statutes providing for such review, District Court jurisdiction is also generally available under Section 10 of the Administrative Procedure Act, 5 USC 1009. Cf. *Leedom* v. *Kyne*, 358 U.S. 184; *ICC* v. *United States Ex Rel. Humboldt SS Co.*, 224 U.S. 474.

[9] "Upon timely application anyone shall be permitted to intervene in an action . . . when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action." Rule 24(a)(2).

Court, there can be no question but that intervention must be granted to a prevailing party before a federal agency if the agency ruling is judicially challenged. See *Textile Workers Union of America* v. *Allendale Co.*, 226 F. 2d 765. But most agency review is in the Courts of Appeals, whose rules contemplate leave to intervene,[10] yet fail to prescribe any standards for such intervention. There is no difference in fact or logic between the intervention issues presented by review proceedings in the Courts of Appeals and those commenced in the District Courts.

ii. Nor is there a discernible difference warranting denial of intervention in the Court of Appeals to a prevailing party before an agency like the Labor Board, when under 5 USC § 1038 the prevailing party before the FCC, the AEC, the Maritime Commission, and the Department of Agriculture, enjoys a statutory right to intervene.[11] Section 1038 provides in the case of Court of Appeals review proceedings from those agencies, that intervention shall be granted to any party "whose interests will be affected if an order of the agency *is or is not* enjoined, set aside or suspended" (emphasis supplied). Moreover, the review statute applicable to the ICC (28 U.S.C. 2323)

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[10] See 1st Cir. Rule 16(6); 2nd Cir. Rule 13(f); 3rd Cir. Rule 18(6); 4th Cir. Rule 27(6); 6th Cir. Rule 13(16); 7th Cir. Rule 14(f); 8th Cir. Rule 27(f); 9th Cir. Rule 34(6); 10th Cir. Rule 34(6); D. C. Cir. Rule 38(f). There clearly exists judicial authority to prescribe intervention rules in the Courts of Appeals similar to Rule 24, Federal Rules of Civil Procedure. See *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F. 2d 514, 524-25, cert. denied 335 U.S. 912.

[11] It is notable that in explaining the statutory revision of which this section was a part, Congress purported to follow "the pattern established for review of orders of the Federal Trade Commission . . . and followed by other laws since then in relation to many other agencies, including . . . the National Labor Relations Board." H.R. 2122, 81st Cong., 2nd Sess., p. 4.

also requires intervention on behalf of a prevailing party before that agency. See *Hudson Transit Lines* v. *United States*, 82 F. Supp. 153, affirmed 338 U.S. 802.

iii. Indeed, in Section 10((l) of the Labor Management Relations Act, Congress recognized the essentially tripartite nature of Labor Board proceedings, providing that when the Board seeks an injunction in the District Court against a Board respondent, its petition shall be served "upon any person involved in the charge and such person, *including the charging party*, shall be given an opportunity to appear by counsel and present any relevant testimony." 29 U.S.C. § 160 (l) (emphasis added). Yet, whereas Congress has thus granted the right of judicial intervention to the *charging party* in judicial proceedings against a Board respondent, the court below bars the Board *respondent* from participation in a judicial review proceeding brought by the charging party.

iv. Finally, the ultimate anomaly of intervention denial to a prevailing respondent before the Labor Board, is that he is thus disadvantaged by his own success before the agency. Where the respondent *loses* before the Board, under Section 10(f) of the Act he may as an "aggrieved party" become a party in the Court of Appeals and thereafter seek or oppose this Court's review. But as a *prevailing party* before the Board, if denied intervention in the Court of Appeals he may not participate as a party there or before this Court and he may neither seek nor oppose this Court's grant of review.

The right of an accused before a federal agency to participate in judicial review of the agency proceedings against him, is too fundamental for fortuity to govern its observance. Yet if the ruling and policy of the Seventh Circuit remain unreviewed, respondents before the Labor Board (and parties before other agencies) can be denied partici-

pation in the judicial review proceedings although they would enjoy precisely that participation (1) had they lost rather than prevailed before the agency, (2) had the review petition been filed instead in the D.C. Circuit, (3) had the proceedings arisen from federal agency orders reviewable under 5 U.S.C. § 1038, 28 U.S.C. 2323, and 29 USC § 160 (l), or (4) had the proceedings been commenced in the District Court from an agency decision there reviewable, and thus been subject to Rule 24.

It is an established principle of this Court to avoid idiosyncratic construction of federal legislation. *Keifer & Keifer* v. *RFC*, 306 U.S. 381. Yet if the court below is correct, then the accused party before the Labor Board may be denied judicial review participation by virtue of his having prevailed before the agency—and this in the face of a contrary rule in most of the circuit courts and numerous decisions of this Court elaborating due process rights of participation and hearing, contrary to salutary principles of intervention promulgated by this Court and approved by the Congress in Rule 24 of the Federal Rules, and notwithstanding specific recognition of standing to intervene in such statutes as 5 U.S.C. § 1038, 28 U.S.C. § 2323, and 29 U.S.C. § 160(l)).

To accept such a result is to infer Congressional idiosyncrasy. In an analogous administrative agency review context this Court refused to infer quixotic Congressional limitation upon traditional Court of Appeals powers. In *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 11, in the absence of a provision for Court of Appeals stay orders on statutory appeals from the FCC, this Court nevertheless upheld "the conventional power of an appellate court to stay the enforcement of an order pending the determination of an appeal . . .", and rejected the argument that by

its silence Congress had curtailed traditional appellate court powers:

> "These controlling considerations [time-honored ancillary judicial powers to prevent irreparable injury] compel the assumption that Congress would not, without clearly expressing such a purpose, deprive the Court of Appeals of its customary power to stay orders under review. . . . The search for significance in the silence of Congress is too often the pursuit of a mirage. We must be wary against interpolating our notions of policy in the interstices of legislative provisions. Here Congress said nothing about the power of the Court of Appeals to issue stay orders under § 402(b). But denial of such power is not to be inferred merely because Congress failed specifically to repeat the general grant of auxiliary powers to the federal courts."

4. *An Appropriate Supervisory Issue.* It is too late in the day for federal courts to insist on determining *in absentia* whether a respondent before the Labor Board has violated federal law. This Court should grant review herein to resolve, by exercise of its general supervisory authority, a recurrent anomoly in the federal appellate system.

Standards of procedural fairness in the Courts of Appeals are within this Court's *"general power to supervise the administration of justice in the federal courts." Western Pacific R. Corp.* v. *Western Pacific R. Co.*, 345 U.S. 247, 260. This Court has made the Federal Rules of Civil Procedure applicable to original proceedings first commenced before it (Rule 9.2), and has granted intervention thereunder to interested parties when *"just, orderly, and effective determination of . . . issues requires that they be adjudicated in a proceeding in which all the interested parties are before the Court." United States* v. *Louisiana*, 354

U.S. 515. Similar principles should apply to agency review proceedings commenced in Courts of Appeals. We urge the Court to grant certiorari herein and hold applicable in the Courts of Appeals such established intervention principles as those recognized in 5 USC § 1038 and Rule 24 of the Federal Rules of Civil Procedure.[12]

Conclusion

It is respectfully submitted that the writ should be granted.

Respectfully submitted,

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[12] We are aware that this Court has declined to review the question here presented on a number of occasions. See *supra*, p. 8. However, this Court's review has previously been opposed on the ground that intervention was denied below for particular reasons such as undue delay in applying therefor in the Court of Appeals, or that intervention denial was too occasional to warrant this Court's consideration. The disposition below in the instant case, on the other hand, makes clear that there now exists a policy of intervention denial in the Seventh Circuit, and we have endeavored in this petition to present the variety of compelling reasons for this Court's remedial review of an increasingly recurrent problem.

APPENDIX A: PLEADINGS AND RULINGS BELOW

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 14698

SCOFIELD, ET AL., *Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION TO INTERVENE WITH CONSENT OF ALL PARTIES

Now comes the INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO, and moves to intervene in this proceeding and in support of said motion states as follows:

1. The Petitioner is the INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO, a labor union.

2. The Union was a respondent in the proceeding below before the National Labor Relations Board, in which the charges against the Union were ultimately dismissed by the Board. This dismissal is one of the alleged errors sought to be reversed by the Petitioner SCOFIELD, an individual, whose status was that of a charging party below and is as the Petitioner in this Court. As Respondent below, the Union will be directly affected by any decision rendered by this Court and desires to be heard on the merits of the controversy.

3. The Union participated fully in the proceedings before the Board and believes that its own interest and the interests of justice require that it be permitted to participate in this proceeding.

4. Counsel for the INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO, has spoken with counsel for Petitioner SCOFIELD and Respondent, National Labor Relations

Board and can advise that both have consented orally to the allowance of our motion to intervene.

5. No delay will be occasioned since your Petitioner herein will file its brief within the time allotted to the Board under the Court's rules.

WHEREFORE, your Petitioner prays that leave be given to the INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO, to intervene in these proceedings or, in the alternative, to permit the filing of a brief by this Petitioner, without prejudice to participation in the oral argument if permission is granted by the panel of Judges which hears the appeal, in accordance with an order entered by this Court in Ramsey v. NLRB, No. 14226, in a parallel situation.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO.

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UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Wednesday, September 16, 1964

Before: Hon. LATHAM CASTLE, Circuit Judge.

No. 14698

RUSSELL SCOFIELD, ET AL., *Petitioners,*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

On consideration of the motion of counsel for International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, for leave to intervene in this proceeding or alternatively for other relief, all parties having consented to the said petition,

IT IS HEREBY ORDERED that leave be granted to said petitioner to file a brief in this cause as amicus curiae without leave to participate in the oral argument of this cause.

Filed October 1, 1964. Kenneth S. Carrick, Clerk.

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 14698

RUSSELL SCOFIELD, ET AL., *Petitioners,*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR RECONSIDERATION BY THE COURT EN BANC OR BY A DIVISION THEREOF OF ORDER DENYING PETITION TO INTERVENE WITH CONSENT OF ALL PARTIES.

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO (Local 283, hereinafter called United Automobile Workers) petitions this Court for reconsideration by the Court, either *en banc* or by a division thereof as provided for in 28 U.S.C. § 46, of its *Petition To Intervene With Consent Of All Parties.* The said Petition was denied by the Honorable Latham Castle, Circuit Judge, sitting as motions judge pursuant to Rule 4 of the Rules of this Court. In support of this petition, the United Automobile Workers shows to the Court as follows:

1. The *Petition To Intervene With Consent Of All Parties* was filed on September 16, 1964. A true and correct copy thereof is attached hereto.

2. On September 16, 1964, the Honorable Latham Castle, Circuit Judge, entered an order denying the *Petition To Intervene With Consent Of All Parties* and granting leave to the United Automobile Workers to file a brief as amicus curiae and denying leave to participate in oral argument.

3. This proceeding is before the Court upon the petition of RUSSELL SCOFIELD, et al., to set aside the decision of the National Labor Relations Board which dismissed a complaint charging the United Automobile Workers with violation of § 8(b)(1)(A) of the Labor-Management Re-

lations Act of 1947, as amended, because it had fined certain members for exceeding incentive pay ceilings. In dismissing the complaint, the Board held essentially that the conduct of the United Automobile Workers was not within the scope of § 8(b)(1)(A), and in addition, that Congress in enacting the proviso to § 8(b)(1)(A) had refrained from regulating internal union affairs, as it had expressly preserved the right of a labor organization "to prescribe its own rules with respect to the acquisition or retention of membership therein . . ."

4. The decision of the Board dismissing the complaint against the Union was issued on January 17, 1964, and on May 18, 1964, the Board denied a motion for reconsideration thereof. The petition for review was filed in this Court on June 26, 1964. The Board's answer thereto was filed on August 6, 1964.

5. Thereafter on September 2, 1964, the Board released its decision in another case in which it appears to have modified or limited its view of the law as expressed in the case below. In *Local 138, International Union of Operating Engineers,* 148 NLRB No. 74, the Board held that a labor organization had violated § 8(b)(1)(A) of the Act by fining members who had instituted administrative proceedings with the Board without having first exhausted internal union remedies for their complaints. While the Board's decision in the *Local 138* case expressly reaffirms and distinguishes the decision in the case at bar, *Local 138* nevertheless appears to be a modification by the Board, with respect to the interpretation and application of § 8(b)(1)(A) of the Act and the proviso thereto, in cases involving internal union disciplinary action.

6. The petitioner, United Automobile Workers, has great respect for the National Labor Relations Board. The Board, however, in view of this recent decision may no longer be in a position to advocate with undivided heart its decision in favor of the United Automobile Workers in the case below. The United Automobile Workers, respondent in that case, cannot and should not be compelled to rely solely upon representation by the Board for protection of the Union's substantial interests herein. The

circumstances are such that the United Automobile Workers should be allowed to defend its own position fully as an intervening party. Cf. *Textile Workers Union* v. *Allendale Co.*, 226 F. 2d 765, 768 (C.A.D.C.) An adverse decision in this Court would seriously affect the United Automobile Workers and its members, and might result in the United Automobile Workers and its members being deprived of substantial rights. The Board does not seek to protect private rights of the United Automobile Workers but only to vindicate public matters. In addition, the United Automobile Workers' internal rules and its general internal procedures will necessarily be involved in this Court's consideration and ultimate decision. The United Automobile Workers is entitled to be heard as of right upon substantial questions in this case which turn upon the interpretation of the internal rules by which it is governed. Many other local unions which are affiliated with the same international union may similarly be seriously affected in their internal government by an adverse decision in this case. Important private interests of the United Automobile Workers and its members are here involved. This is a case where "the enforcement of a public law also demands distinct safeguarding of private interests," which are "not left to the public authorities" solely. Cf., *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502, 505, quoted in *Textile Workers Union* v. *Allendale Co.*, 226 F. 2d 765, 768. (C.A.D.C.).

7. The United Automobile Workers should be permitted to intervene as a party herein in order to assure its status to seek review in the Supreme Court of the United States in the event of an adverse decision in this Court.[1] Otherwise, if the Board is not disposed to seek review in the Supreme Court in the event of an adverse decision in this Court the United Automobile Workers will be deprived of an opportunity to obtain review of a decision which could involve serious consequences to the United Automo-

[1] An intervenor has standing to seek Supreme Court review of a decree adverse to its beneficial interest in a Board order. *International Union of Mine, Mill and Smelter Workers* v. *Eagle Picher Mining and Smelting Co.*, 325 U.S. 335, 338, 339 (1945).

bile Workers, including the local union herein and many other local unions as well.

8. The petitioner believes that the issue of the right of a party respondent in a Board proceeding to intervene as a party in review proceedings is of sufficient importance to warrant further review of that question by the Supreme Court of the United States. Before requesting such review, petitioner believes it only appropriate to first move this Court for full consideration *en banc* or by a division thereof of its petition to intervene.

9. We are aware that this Court has in other cases denied leave to intervene. However, in at least one recent case, *Ekco Products Company* v. *N.L.R.B.*, No. 12166, February 21, 1958, this Court upon reconsideration granted leave to intervene to a labor organization which had been the successful charging party in a case before the Board. In *Ekco* there had occurred a doctrinal shift by the Board following its initial decision under review; and there as here the union seeking intervention sought to protect its constitution and its other interests which were affected. The Court stated as follows:

> "The United Steelworkers of America, AFL-CIO, having petitioned for leave to intervene, and having represented that the National Labor Relations Board has, since its decision herein, shifted its position upon an issue which is of great importance to said Steelworkers in the case at bar, and generally, whenever that organization has representation contracts; and having further represented that an interpretation of the Constitution of the Steelworkers organization is likewise in issue in the case at bar
>
> "It Is Ordered that leave be granted to the United Steelworkers of America, AFL-CIO to intervene herein and to file its brief on or before ten (10) days from the date of this order, sending copies to the other parties herein."

The reasoning of this Court in *Ekco* in granting intervention to the charging party applies with at least equal if not greater force to this petitioner, which should not be

left as a respondent with no opportunity to defend. A true and correct copy of this Court's order in *Ekco* is attached hereto.

Wherefore, it is urged that this Court reconsider the *Petition To Intervene With Consent Of All Parties, en banc,* or by a division thereof, and grant said Petition.[2] If the *Petition* is granted, the petitioner will promptly file its brief as intervenor so that there will be no delay of the proceedings in this Court.

Respectfully submitted,

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO (Local 283)

By JOSEPH L. RAUH, JR.,
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[2] Counsel for the Board has authorized us to state that as a matter of policy, the Board does not oppose intervention by the party which was a respondent before the Board, in any review proceedings in courts of appeals.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

October 6, 1964

BEFORE: Hon. JOHN S. HASTINGS, Chief Judge, WIN G. KNOCH, Circuit Judge, LATHAM CASTLE, Circuit Judge

No. 14698

RUSSELL SCOFIELD, ET AL., *Petitioners,*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

On consideration of the petition of the respondent in the above entitled proceeding, The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO (Local 283), for reconsideration by the Court, either *en banc* or by a division thereof, of the order of this Court entered September 16, 1964, denying said respondents's petition to intervene in said proceeding;

IT IS HEREBY ORDERED that the petition for reconsideration be and is hereby DENIED.

(3050-2)